United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2226

No. 74-2226

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTATE OF MORRIS R. SILVERMAN,
AVRUM SILVERMAN, Executor,

Petitioner-Appellant,

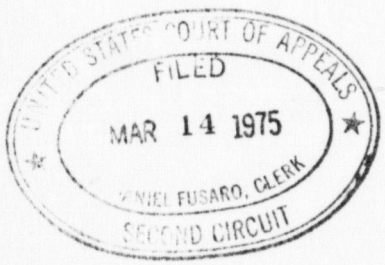
v

COMMISSIONER OF INTERNAL REVENUE,

Defendant- Respondent.

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLANT



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STATEMENT OF THE ISSUES PRESENTED

1. Whether the tax court erred in holding that the transfer of the life insurance policy by Morris R. Silverman, deceased, to the petitioner-appellant was made in contemplation of death within the meaning of Sec. 2035, Internal Revenue Code of 1954.

2. Whether the tax court erred in determining the quantum of inclusion to be that portion of the face value of the policy equal to the ratio of premiums paid by the decedent to the total premiums paid.

STATEMENT OF THE CASE

AVRUM SILVERMAN, executor of the Estate of Morris R. Silverman, his father, appeals from the determination of the United States Tax Court (Sterrett, Judge) T C. finding a deficiency in petitioner's Federal est[illegible] tax in the sum of $1,705.25.

The basis of the Tax Court's findings was that a certain life insurance policy for $10,000 on the life of decedent was assigned by him to his son the petitioner in contemplation of death within the meaning of Sec. 2035, Internal Revenue Code, requiring the inclusion of the proceeds of the policy in the decedent's gross estate.

The court further decided that so much of the face amount of the policy, was to be included in the gross estate as the proportion of the premiums paid by the son, after the assignment to him of the policy, was to the total premiums paid since the inception of the policy amounting to $3,261.20. The petitioner had paid $368.20 or 11.29 per cent and decedent had paid $2,893 or 88.71 per cent of the premiums and accordingly the court excluded from the gross estate that portion of the value which petitioner had contributed, or, as stated in the court's opinion,

> "the quantum of inclusion is that portion of the face value equal to the ratio of premiums paid by the decedent to total premiums paid."

Petitioner-appellant filed his notice of appeal to this Circuit on February 20, 1974. Respondent cross-appealed in this Court, and also appealed to the First District Circuit Court on September 20, 1975. Thereafter respondent agreed to a dismissal of its appeal to the First Circuit and subsequently stipulated to a discontinuance of its cross appeal in this court leaving only the present appeal by taxpayer appellant from the tax court's decision.

Morris R. Silverman, decedent, had drawn his will on November 18, 1961 leaving his entire estate to his wife, Mabel and if she predeceased him to his only son Avrum, (R.P. 14, Ex. 1A). He never changed his will (R.P. 25). On May 25, 1961 he purchased a life insurance policy with a face value of $10,000 designating his wife, Mabel as primary beneficiary and appellant his only son, secondary beneficiary.

Meanwhile, on December 12, 1965 his wife died and during the week of mourning, he met his insurance broker and nephew, Joseph Breitstone and stated that he wanted his insurance cancelled (R.P. 33); that he had no further need for the coverage (his beneficiary wife having just died). The broker instead of having the policy surrendered, recommended that decedent transfer the ownership of the policy to his son who would thereafter be responsible for the payment of future premiums. The father had paid premiums of $52.60 monthly from May 1961 until January 1966, or a total of $2,893 (R.P. 18) and the son made seven payments

after the assignment totaling 368.20.

On July 26, 1966 Silverman died. His son was appointed executor on September 2, 1966 being now, because of his mother's prior death, the sole beneficiary under his father's will. Letters testamentary were issued to the son, now appellant on September 22, 1966 out of the Surrogate's Court, Queens County, New York.

Decedent died of cancer, his medical history having been introduced by the respondent as an exhibit in the case, by stipulation before trial.

The respondent rested its case on this and other exhibits set forth in the appendix but did not produce any live witnesses at the trial nor cross examine Breitstone, the one person who best could testify as to the dominant motive of the decedent in transferring his insurance policy to his son some seven months before he died, (R.P. 36).

The record shows without contradiction that decedent's dominant motive was to divest himself of the obligation of having to continue paying monthly premiums on a policy of insurance whose primary purpose, the protection and benefit of his wife, had failed because of his wife's prior death.

He was in seeming good health and worked steadily at his difficult job (R.P. 17, 21) until February 1966. He did not believe in insurance and preferred investing his money on the stock market. Most of his estate was in stocks (R.P. 22-24). His will drawn in 1961 was never changed.

Decedent had a negative attitude toward life insurance (R.P. 32). He passed a medical examination before he was insured (R.P. 33).

The gist of the uncontradicted facts from which his dominant motive could fairly be inferred is contained in pages 33 to 35 of the record.

At page 33 lines 18 et. seq. occurs the following colloquy:

Q. Was there any conversation between the two of you regarding the disposition of that policy which had been written --

A. Yes, he wanted to cancel it.

Q. Did he say that to you himself?

A. Yes.

Did he give you any reason?

A. He had no further need for the coverage.

Q. Did he instruct you to cancel it?

A. Yes.

Q. Did you cancel it?

A. No

Q. Did you then tell him what you proposed to do?

A. I recommended that I transfer ownership to his son. I said that his son would be responsible for the future premiums.

SUMMARY OF ARGUMENTS

The Tax Court erred in finding facts which are not supported by the record excepting the medical history of the decedent, and further erred in disregarding the positive and affirmative proof that it was decedent's dominant motive and intention to cancel his insurance following his wife's death and invest his money in Wall Street.

Assuming that the Tax Court was right in finding the transfer of decedent's policy to have been made in contemplation of death, it erred further, in holding that the quantum of inclusion was that portion of the face value equal to the ratio of premiums paid by the decedent to total premiums paid. Appellant contends that only the value of the premiums paid by the decedent within three years of his death, less the period after which he had assigned his policy or from July 26, 1963, until January 29, 1966 should be the quantum of inclusion.

ARGUMENT

The fair preponderance of the facts adduced at the trial support the appellant's position that the dominant motive of the testator in assigning his insurance policy was to save himself of the obligation to continue the payment of inheritance taxes by his estate.

To determine the character of the transfer one must look into the dominant motive, United States v. Wells, 283 U. S. 102.

The medical history of the decedent, upon which the trial court seems to have primarily relied, is but one of many factors to consider in determining whether the gift was made in contemplation of death within the meaning of the statute. Estate of Oliver Johnson, 10 T.C. 680, 688.

Were it not for the fact that the decedent died of cancer some six months after the assignment of his policy, there would have been no other factual basis of any probative consequence upon which to predicate a transfer in contemplation of death, except for the additional presumptions or inferences of the trial court based on the letter of Breitstone, the broker nephew. Yet despite the directly contrary testimony on the witness stand by Breitstone, neither the respondent's attorney or the Court saw fit to rebut this witness's testimony or even introduce the letter at the trial but it seems to have come as an afterthought to the trial court to sustain its ground for its determination that the policy was assigned in contemplation

of death.

Since motives are never singular but are most often mixed and at times conflicting, the court should have given more weight and consideration to the many other relevant factors introduced at the trial in determining the dominant motive that led to the assignment of the policy.

The Treasury Regulations on this subject (20. 2035 et. seq.) hold a transfer to be in contemplation of death if (1) made for the purpose of avoiding death taxes (2) made as a substitute for a testamentary disposition, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition.

The respondent in its trial brief cited the case of First National Bank of Midlands at Lubbock v. United States, 492 Fed 2nd 1286, in support of its position, but that case turned on the fact that there was no credible evidence at all to support the taxpayer in his contention that the four gifts given to a daughter within four months of decedent's death, had not been given "in contemplation of death" under Section 2035. On appeal it was held that the government should not rely on Sec. 2035 (b) as a virtually irrebuttable presumption but held that only in that particular case the taxpayer was unable to present specific evidence of life motive.

The same circuit Court in BEL v. UNITED STATES, 452 Fed. 2nd 683, explained the general principles involved in interpreting Section 2035, as follows:

> ". . . . the underlying purpose of Section 2035 is to prevent evasion of the federal estate tax by excising those transfers of a decedent which are essentially substitutes for testamentary dispositions U.S. v. Wells, 283 U.S. 102. Accordingly, the presumption embodied in Section 2035 (b) is rebuttable for if a taxpayer can demonstrate that a donation made within the three year period was not a substitute for a testamentary disposition, then the dominant purpose of Section 2035 is not served by taxing such a transfer. Therefore, in every instance in which a transfer is effectuated within the statutory period, the crucial inquiry is whether or not the donation represents a testamentary substitute, or in statutory terminology, whether or not the transfer was made "in contemplation of death."
>
> "The phrase 'in contemplation of death" does not encompass the general expectation of death which all mortals entertain. Rather the Supreme Court has held that a transfer is made in contemplation of death only if the thought of death is the compelling cause of the transfer. Allen v. Trust Co. of Georgia, 326 U.S. 630,635. Of course, the statutory presumption casts upon the taxpayer the burden of proof as to the dominant and compelling motive of the decedent in making a transfer. This means that the taxpayer has the task of persuading a court that in transferring property the decedent was not motivated by purposes associated with death. Fatter v. Usry, E.D. La. 1967, 269 F. Supp. 582. And, of course, whether or not any particular purpose was 'the dominant, controlling or compelling motive' is a question of fact in each case. Allan v. Trust Co. of Georgia, supra, 326 U.S. at 636, 66 S Ct. at 392."

In Landorf v. U.S., 408 F.2nd 461, at page 472, the court

> " Generally, both life and death motives are involved in these transfers and the inquiry therefore becomes whether the 'life' motives were the 'dominant, controlling or impelling' reasons for the transfer."

In our case the facts clearly reflect a 'life' motive. Appellant showed without contradiction that (a) there was never any discussion with the decedent concerning estate planning (b) the decedent had made his will in 1961 and never changed it (r.p. 25) (c) the decedent's gift of his insurance policy was a relatively small part of his total estate (r.p. 24) (d) the decedent did not believe that he was dying but worked regularly and hard till the week in February 1966 when he went to the hospital (r.p. 21) (e) the decedent wa shown to have affirmatively and positively wanted his insurance cancelled after the death of his wife (r.p. 33-35) (f) decedent was solely concerned with a life motive to avoid having to continue the payment of premiums on his policy and to, instead, invest his money thus saved in the stock market (r.p. 24) (g) decedent, not on friendly terms with his son, showed no concern about saving any part of his estate from inheritance taxes that might have to be paid by his son (r.p. 25) (h) decedent was not shown to have had any knowledge that his estate would eventually have to pay an inheritance tax and made no ostensible effort to plan accordingly.

As against all this and much more, not outlined here, we have only the cold statistical and documentary evidence, fragmentary at best, unsupported by the testimony of any physician in Court or by deposition, of a hospitalization some several months after the assignment. We maintain that in balance, the overwhelming credible

and competent evidence in this trial was that there was no transfer made in contemplation of death within the meaning of the statute.

ARGUMENT 2

The Tax Court erred in holding that so much of the face amount of the policy as represented 88.71 per cent of the total premiumspaid should be included in the gross estate (Court's opinion p.10). We believe that only so much of the premiums paid during the period beginning July 26, 1963, three years prior to the decedent's death, and ending January 28, 1966, the date of the assignment of the policy should be added to the gross estate regardless of the face amount of the policy which in no event should be any measure of the quantum to include in the addition to the gross estate.

In the case of Bentliff v. U. S., 462 Fed. 2nd 403, (5th Cir. Court of Appeal, April 21, 1972), the court held that only the premiums paid in contemplation of death not the entire proceeds of a life insurance policy are includible in decedent's gross estate.

At page 406 it stated:

> "It is settled law in this Court that the premium paid in contemplation of death, not the whole of life insurance proceeds, are includible in the decedent's gross estate under Sec. 2035. See First National Bank of Midland v. U. S., 5th Cir. 1970, 423 Fed. 2d 1286.

In the case of Hull's Estate, 325 Fed. 2d 367 at page 369, the court stated:

> "It is not reasonable to believe that the motive for the transfer of full ownership rights was to provide for a distribution of death benefits that was already assured without need for any further action. Beyond this, by transferring the policies to Elizabeth, her father actually diminished the likelihood that she would receive the full face value of the policies upon his death. For by this transfer he put it within her power to surrender the policies at any time, for cash value, to borrow upon them or to make some other persons the death beneficiary. We cannot conceive of a rational person seeking to achieve an end by means which obviously make the realization of that end less liable."

The Court in Hull concluded that the stated purpose of immediately improving the daughter's mental and emotional state was entirely plausible and should have been accepted as dominant in the father's mind and reversed the judgment of the court below.

Following the same logic in our situation, the decedent knew that once he gave up all rights to his insurance, the son Avrum, could cash-surrender the policy and possess himself of the proceeds without further ado or he could assign it again to someone else.

In Gorman v. U. S. 68 T.C. 125, it was held that "only the premiums paid by an insured decedent in contemplation of death and made within three years of death are includable when he transfers the incidents of ownership" and in Estate of William C. Chapin 29 T.C. M-11, it was held that only the amount equal to the first premium of $1,080 should be included in the taxable estate and not the total proceeds of the insurance, (more than $200,000.00).

In the case of First National Bank of Midland, Texas v. U.S., 432 F. 2nd 1236, it was held that no part of the proceeds in that case , was includable under Section 2035.

Under Rev. Ruling 67-463, which was subsequently revoked by Ruling 71-497, the I.R.S. had held that each premium payment made by a decedent on an insurance policy, on his lefe owned by another was a transfer of an interest in the policy measured by the proportion the premiums so paid bears to the total premiums paid. Using even this test, decedent, Silverman, within three years of his death paid 36 premiums of $52.60 each, less the seven premiums paid by his son after the assignment to him of the policy and while his father was still alive. The total in premiums paid by the father during this period was $1,524.40.

Reg. Ruling 71-497, following the Midland case, supra, states that only the value of any premiums paid by the decedent in contemplation of death, within three years of his death is includable in his gross estate under Sec. 2035 of the Code, citing Gorman v. U.S., 288 F. Supp. 222; Estate of Inez G. Coleman v. Comm. etc., 52 T.C. 921.

Following these cases, the 29 premiums paid by decedent during the three years that it may be presumed that he may have transferred his policy in contemplation of death, which we vigorously deny, the includable value added to the estate would then have to be $1,524.40.

Another possible way of computing the includable value to be added to the gross estate would be the cash surrender value of the policy before the assignment to the son. The entire cash surrender value at the time of death was $1,260.00. Had the policy been surrendered in December, 1965, after Mabel's death, as decedent had wanted to and requested his broker to do (r.p. 33), the cash surrender value then would have been $1,120.00 or 8/9 th the value at the time of death, since the 9th of the premiums had been paid by the son, Avrum after the assignment to him of the policy.

CONCLUSION.

THE TRANSFER OF THE LIFE INSURANCE POLICY WAS NOT MADE IN CONTEMPLATION OF DEATH AND THE POLICY SHOULD NOT HAVE BEEN INCLUDED IN THE TAXABLE ESTATE.

IF FOUND TO HAVE BEEN MADE IN CONTEMPLATION OF DEATH, THEN THE QUANTUM OF INCLUSION SHOULD BE THE AMOUNT OF THE PREMIUMS PAID BY THE DECEDENT DURING THE PERIOD FROM MARCH 26, 1963 (THREE YEARS BEFORE HIS DEATH,) TO JANUARY 28, 1966, THE DATE OF THE ASSIGNMENT OF THE POLICY.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1954
Section 2035

TRANSFERS MADE IN CONTEMPLATION OF DEATH.

(a) GENERAL RULE. The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) APPLICATION OF GENERAL RULE. ---- If the decedent within a period of three years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power or exercised or released a general power of appointment, such transfer, relinquishment, exercise or release, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and section 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 4th day of March, 1975, in an envelope with prepaid postage, properly addressed to them as follows:

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